Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1997

JOSEPH E. BIGELOW; WAYLAND BLAKELY; SIMON BOLDEN; CARLTON BROWN; WILLIAM DANNER; ENOCH DAVIS; RANDALL DUVALL; TERRY HILLARD; CHARLES HOGUE, JR.; LARRY HOWARD; GEORGE HUDSON; RODNEY H. KELIEN; JOE LEONARD; DALE LEWIS; ADAM LUDLOW; DANIEL L. MILLER, JR.; STEVE NIFONG; JACK PATE; MORRIS A. ROSE; BILL SANDERS; HARLEY STARNES; PAUL STONER; WILLIAM STROUD and RON WEAVIL - - - - - - - - *Petitioners*

versus

DALLAS & MAVIS FORWARDING COMPANY, INC., a Subsidiary of JUPITER TRANSPORTATION COMPANY - - - - - - *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

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37 pp

QUESTION PRESENTED FOR REVIEW

Should this Court adopt a "bright-line" rule of law to the effect that no claims of unlawful employment discrimination based upon state statutes that mirror the Age Discrimination in Employment Act, 29 U.S.C. §621, et. seq., Title VII, 42 U.S.C. §2000e, et. seq., or similar laws, may ever be "preempted" by "§301" of the National Labor-Management Relations Act [now 29 U.S.C. §185(a)]?

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

OPINIONS AND ORDERS BELOW

The Supreme Court of Kentucky entered an Order denying discretionary review in this case on May 14, 1997, No. 96-SC-709-D, which Order may be found in the Appendix of this Brief as Exhibit D.

The Court of Appeals of Kentucky rendered its opinion in this case on June 7, 1996, No. 94CA-1176-MR, which opinion may be found in the Appendix of this Brief as Exhibit B. The Court of Appeals denied plaintiff's Petition for Rehearing by Order dated July 26, 1996, which Order may be found in the Appendix of this Brief as Exhibit C.

The Jefferson Circuit Court of the Commonwealth of Kentucky entered a Memorandum and Order dismissing the Plaintiffs' claims in this case on May 9, 1994, No. 92CI-01187, which Memorandum and Order may be found in the Appendix of this Brief as Exhibit A.

JURISDICTION OF THE COURT

The Order sought to be reviewed was entered on May 14, 1997.

The jurisdiction of this Court is invoked under 28 United States Code §1257(3).

STATUTORY PROVISIONS INVOLVED IN THIS CASE

29 United States Code §185(a)

Suits for violation of contracts between an employee and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

42 United States Code §2000e-2(a)(1)

It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privi-

leges of employment, because of such individual's race, color, religion, sex, or national origin;

29 United States Code §623(a)(1)

It shall be unlawful for an employer to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's age;

42 United States Code §2000e-7

Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter.

29 United States Code §633(a)

Nothing in this chapter shall affect the jurisdiction of any agency of any State performing like functions with regard to discriminatory employment practices on account of age except that upon commencement of action under this chapter such action shall supersede any State action.

Kentucky Revised Statutes §344.040(1)

It is an unlawful practice for an employer to fail or refuse to hire, or to discharge any individual, or otherwise to discriminate against an individual with respect to compensation, terms, conditions, or privileges of employment, because of the individual's disability, race, color, religion, national origin, sex, age between forty (40) and seventy (70), or because the individual is a smoker or nonsmoker, as long as the person complies with any workplace policy concerning smoking.

Kentucky Revised Statutes §344.450

Any person deeming himself injured by any act in violation of the provisions of this chapter shall have a civil cause of action in Circuit Court to enjoin further violations, and to recover the actual damages sustained by him, together with the costs of the law suit, including a reasonable fee for his attorney of record, all of which shall be in addition to any other remedies contained in this chapter.

STATEMENT OF THE CASE

Material Facts

The Petitioners are 24 of 88 individuals who were, until March, 1990, employed by a company known as Allied Systems, Inc., to man the "yard and decking" operations of Allied at the Kentucky Truck Plant of Ford Motor Company just outside of Louisville, Kentucky. The yard and decking operations consisted of mounting newly manufactured trucks on to tractor-trailer trucks for delivery to retail truck dealers throughout North America.

In March, 1990, the Respondent, Dallas and Mavis Forwarding Company, a subsidiary of Jupiter Transportation Company, took over the yard and decking operations at the Kentucky Truck Plant pursuant to a contract with Ford; Allied having failed to win a renewal of its contract.

All Allied and Dallas and Mavis employees eligible to do yard and decking work were members of the International Brotherhood of Teamsters, local 89. The Teamsters, Allied, Dallas and Mavis, and Ford were parties to a labor agreement governing the rights of employers and employees working at the Kentucky Truck Plant. This agreement was known as the National Master Automobile Transporters Agreement and included several "riders" applicable to the Kentucky Truck Plant.

When Dallas and Mavis took over the yard and decking operations at the Kentucky Truck Plant, Allied laid off the

Petitioners and their co-workers, the group of 88 mentioned above. These individuals believed that their labor agreements gave them the right to "follow the work" at the Kentucky Truck Plant without regard to the particular company that had contracted with Ford to perform yard and decking operations. Dallas and Mavis, on the other hand, purported to believe that the labor contracts required it to employ its own employees. When the former Allied employees sought to report to work at the Kentucky Truck Plant, Dallas and Mavis turned them away.

The former Allied employees then filed a grievance, pursuant to the National Master Agreement and relevant supplements. Dallas and Mavis vigorously contested this grievance. Nevertheless, on December 14, 1990, a Board of Arbitration essentially sustained the grievance of the displaced former Allied employees by ordering Dallas and Mavis to "dovetail" its seniority roster for the yard and mounting operations at the Kentucky Truck Plant with the seniority roster of Allied Systems, Inc.

Almost all of the former Allied employees were senior to the Dallas and Mavis employees and thus were eligible to "bump" them.

Dallas and Mavis sought to set aside the findings and award of the Board of Arbitration by filing a lawsuit in the United States District Court for Western Kentucky. It lost. It then appealed to the United States Court of Appeals for the Sixth Circuit and lost again, *Dallas and Mavis Forwarding Co.* v. *Local Union 89,* 972 F.2d 129 (6th Circ., 1992). Finally it sought a writ of certiorari from this Court. Its petition was denied on January 11, 1993, 506 U.S. 1051, 113 S.Ct. 973, 122 L.Ed.2d 128.

During December, 1991, Dallas and Mavis began complying with the Order of the Board of Arbitration by reemploying former Allied employees based upon their seniority. Most of the Petitioners returned to work at this time or

shortly thereafter, although some had retired, become disabled, or found other employment during the 21 months that they had been out of their yard and decking jobs.

Although it took several more years, the former Allied workers recalled to work by Dallas and Mavis also received back pay and other benefits provided by the relevant labor contracts.

On February 20, 1992, the Petitioners filed this lawsuit in the Jefferson Circuit Court of the Commonwealth of Kentucky alleging that Dallas and Mavis's decision to replace them with Dallas and Mavis employees was motivated by age bias in violation of Kentucky Revised Statutes §344.040(1), one part of the Kentucky Civil Rights Act of 1968, as amended. Such lawsuits are separately authorized by Kentucky Revised Statutes §344.450. In this lawsuit, the movants sought damages beyond those to which they were entitled under their union contract, most significantly those relating to the intangible injuries that they suffered such as for humiliation, embarrassment, and mental and emotional distress, all of which are available in actions brought pursuant to KRS 344.450, *Meyers* v. *Chapman Printing Co., Inc.*, Ky. 840 S.W.2d 814 (1992).

The Petitioners' evidence of age bias consisted of an approximately nine year age difference between the top 40 members of the Allied seniority roster and the Dallas and Mavis seniority roster (Dallas and Mavis initially manned the yard and decking operation with only 40 employees); the fact that fully 40% of the Dallas and Mavis workers were under 40 while only 7.5% of the Allied employees were (Transcript of Record, hereinafter TR, pp. 914-917); the fact that Dallas and Mavis realized a 5% payroll savings because of the lower vacation pay entitlement of its younger workforce; the fact that it apparently specifically argued to the Board of arbitration that it had, in the words of the Board, ". . . a perceived self-interest in obtaining a

younger workforce," than that presented by the former Allied employees (TR, Birdsall Affidavit, Ex. 10, p. 36); and that fact that its terminal manager, Gerald Winters, made age-biased statements in the presence of two of the Petitioners concerning the former Allied yard and decking employees. (Deposition of Dale Lewis, p. 33; Deposition of Morris Rose, p. 53).

The Pre-Emption Defense in this Case

At paragraph 7 of the "Affirmative Defenses" section of the Respondent's Answer in this case, Dallas and Mavis pleaded that the, "Plaintiffs' claims are preempted by Federal labor law under §301 of the Labor Management Relations Act, 29 USC §185(a)."

After discovery was completed, the Respondent moved for summary judgment and spent considerable effort amplifying its argument that the Petitioners' claims were preempted, as set forth in the above paragraph (TR, Motion for Summary Judgment, pp. 16-21)

The Jefferson Circuit Court accepted this argument and dismissed the Petitioners' lawsuit. It held that their claims were preempted by §301 of the National Labor relations Act because, ". . . but for the Union Agreements the Plaintiffs would not have had any claim," under the Kentucky Civil Rights Act, in that they would have had no entitlement to benefit from the seniority provisions of the agreement (Opinion of the Jefferson Circuit Court, p. 4; Appendix, Ex. D, p. 4a).

The Kentucky Court of Appeals agreed that the Petitioners' claims of age discrimination in violation of Kentucky Revised Statutes §344.040(1) were preempted by §301 of the National Labor Relations Act. This was because, according to the Court:

> The matter regarding which workers should be called by Dallas and Mavis to work clearly fell under the

> collective bargaining agreement. . . and the appellants' claim regarding who should have been called to work and their discrimination claims are inextricably intertwined with the terms of the agreement and to resolve the dispute, one must consider the agreement (Opinion of the Court of Appeals, p. 7; Appendix, p. 10a).

Throughout the proceedings below, of course, the Movants urged upon the Courts the rule set forth by this Court in *Lingle* v. *Norge, Div. of Magic Chef, Inc.*, 486 U.S. 399, 413, 108 S.Ct. 877, 885, 100 L.Ed.2d 410 (1988), as follows:

> Section 301 does not preempt [actions brought under] state antidiscrimination laws, even though a suit under these laws requires a state court to determine whether a just cause existed to justify the discharge [of the aggrieved employee].

In addition, the Petitioners argued to the Kentucky Courts that Respondent had not been able to cite so much as one opinion in which a Court of the United States or the several states had held, since *Lingle* was published, that §301 preempts a claims based upon an alleged violation of a state law prohibiting some form of invidious discrimination.

Finally, of course, the Petitioners cited several opinions from the federal appellate courts that appeared to indicate that state law discrimination claims are never preempted by §301. The Kentucky Court of Appeals rejected Movants reliance upon all of these arguments, and held that:

> The facts of the instant case are distinguishable from *Lingle* v. *Norge Div. of Magic Chef, Inc., supra; O'Shea* v. *Detroit News,* 887 F.2d 683 (6th Circ. 1989), and other cases relied on by the appellants (Opinion of the Court of Appeals, p. 7; Appendix, p. 11a).

As we have seen, of course, the Kentucky Supreme Court did not elect to review the opinions of its inferior courts.

ARGUMENT

THE DECISION FOR WHICH REVIEW IS SOUGHT PRESENTS THIS IMPORTANT FEDERAL QUESTION THAT HAS NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT: WHETHER §301 OF THE NATIONAL LABOR MANAGEMENT RELATIONS ACT EVER PREEMPTS STATE-LAW CLAIMS OF AGE DISCRIMINATION, OR OTHER FORMS OF DISCRIMINATION THAT ARE ALSO PROHIBITED BY FEDERAL LAW.

As we have seen, the Petitioners argued below that this Court's opinion in *Lingle* v. *Norge, Div. of Magic Chef, Inc.*, 486 U.S. 399, precluded any application of §301 pre-emption doctrine to their claims of age discrimination under Kentucky law.

As we have also seen, the Kentucky Courts rejected this argument.

Obviously, the *Lingle* opinion contained an exhaustive analysis of the law and application of §301 pre-emption. Unfortunately, the Kentucky Courts in this case, and other state and federal Courts in other cases have taken this to mean that they must apply such an analysis to every claim based upon state law and involving a collective bargaining agreement, even claims based upon state statutes prohibiting the same forms of invidious discrimination that are prohibited by federal anti-discrimination statutes such as 42 U.S.C. §2000e, *et seq.* and 2d U.S.C. §621, et seq.

While this cases by case approach almost always results in a conclusion of no §301 pre-emption as to such claims, it wastes valuable judicial resources and occasionally results in such an obvious injustice as the Petitioners have suffered in this case.

What is clearly needed is a "bright line" rule of law to the effect that state law claims of invidious workplace discrimination, at least such claims that seek to redress the forms of discrimination prohibited by federal anti-discrimi-

nation law, are never preempted by §301 of the National Labor Management Relations Act.

It was impossible for this Court to articulate such a rule in the *Lingle* opinion, of course, for the simple reason that *Lingle* involved a state-law claim that did not mirror federal law. There is no federal law of any sort that purports to regulate or prohibit discrimination against employees, such as the plaintiff in *Lingle,* who file worker's compensation claims against their employers.

Petitioners believe that this case would be a fit vehicle for this Court to articulate the "bright line" rule suggested above. Unlike the plaintiff in *Lingle,* Petitioners are seeking to vindicate their right to be free from a form of illegal discrimination, age bias, that is also illegal under federal law, 29 U.S.C. §621, *et. seq.*

Opinions of several of the United States Courts of Appeal appear to be pointing in the direction of Petitioners' suggested rule of law for cases such as this.

In *O'Shea* v. *Detroit News,* 887 F.2d 683, 687 (6th Circ., 1989), and *Jarvis* v. *Nobel/Sysco Food Service Co.,* 985 F.2d 1419 (10th Circ., 1993) the Courts rejected employer claims that state law discrimination claims are preempted by §301 where the allegedly discriminatorily applied entitlement exists only by virtue of a collective bargaining agreement. As the Court said in *Jarvis, supra,* at 1427:

> So long as the state law cause of action is concerned not with the employer's contractual right to discharge the employee, but rather with its motives in exercising that right, the CBA is not relevant and pre-emption does not apply.

Even more recently, the United States Court of Appeals for the Sixth Circuit pointed out the absurdity of ever accepting a pre-emption argument in cases such as the one at bar, stating that:

> Title VII specifically does not pre-empt state civil rights actions. 42 U.S.C. §2000e-7. It should be self-evident that if Congress did not pre-empt state civil rights actions by operation of federal civil rights law, it could not have meant to do so through federal labor law.

Tisdale v. *Local 704,* 25 F.2d 1308, 1312 (6th Circ., 1994). The same of course is true of the federal Age Discrimination in Employment Act, 29 U.S.C. §633, *Simpson* v. *Alaska State Commission For Human Rights,* 608 F.2d 1171 (9th Circ., 1979).

The problem with the cases-by-case analysis still employed by the Courts in cases such as this is that well-established principles of pre-emption law often appear to require the dismissal of valid state-law discrimination claims. Under traditional principles of pre-emption, claims founded directly upon rights created by a collective bargaining agreement are pre-empted, as the Kentucky Court of Appeals stated [Appendix, Exhibit B, Opinion of the Court of Appeals, p. 5; citing *Adkins* v. *General Motors Corp.,* 946 F.2d 1201, 1907 (6th Circ., 1991)]. Petitioners cannot deny that their right to "follow their work" was founded directly upon the terms of their collective bargaining. Their comeback to the pre-emption argument, of course, is that traditional pre-emption analysis does not apply because the Respondent had no more right to seek to deny their contractual right to "follow their work," because of their age than it did to discriminate against them for that reason in any other of the, "compensation, terms, conditions or privileges" of their employment.

This problem is even more sharply illustrated by the case of *Judy Wild and Salena Darnell* v. *Huttig Sash & Door Company,* Civil Action No. 3:95CV-568-S (W.D. Ky., June 4, 1996) attached hereto as Exhibit E. Even a District Court under the supervision of the United States Court of Appeals for the Sixth Circuit, which obviously leads the way in pointing toward the adoption of the "bright-line"

rule sought by Petitioners in this case could originally apply pre-emption analysis so as to dismiss an obviously viable state law claim of sex bias. As the Court's attached Memorandum Opinion in that case shows, it was persuaded to reverse itself upon a timely FRCP 59 motion, but only after once *again* applying pre-emption analysis! Although *O'Shea, supra* appears to iterate a "bright-line" rule such as that sought by Petitioners in this case, Judge Simpson obviously felt compelled to jump through the pre-emption hoops that probably still legitimately apply to state law tort claims not involving alleged unlawful discrimination, as set forth in *Lingle, supra,* and developed by the United States Court of Appeals for the Sixth Circuit in *DeCoe* v. *General Motors Corp.,* 32 F.3d 212 (6th Circ., 1994).

Lest there by any doubt that: a) a full-blown analysis of the law of pre-emption is an arduous and tedious task; and b) that Judge Simpson was far from alone in believing that prevailing law requires such an analysis even in claims based upon state laws prohibiting illegal sex, age, race, and related discrimination; the Petitioners refer the Court to the following sampling of opinions: *Quesnel* v. *Prudential Ins. Co.,* 66 F.3d 8 (1st Circ., 1995), *Baker* v. *Farmer's Elec. Co-Op, Inc.,* 34 F.3d 274 (5th Circ., 1994), *Johnson* v. *Beatrice Foods Co.,* 921 F.2d 1015 (10th Circ., 1990), and *McCormick* v. *A T & T Technology, Inc.,* 934 F.2d 551 (4th Circ., 1991).

The Petitioners' suggested "bright line" rule of law would put an end to the obvious waste of precious judicial resources represented by the current state of the law on the issue of the relationship between "§301" and state law employment discrimination claims. It would also stop the possibility of injustice and error as illustrated by the opinions in this case and Judge Simpson's initial ruling in the Wild opinion previously discussed. For these two reasons this Court should grant this petition and settle this important question of federal law.

Respectfully Submitted,

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APPENDIX

EXHIBIT A

JEFFERSON CIRCUIT COURT

DIVISION FIFTEEN (15)

Case No. 92 CI 01187

JOSEPH E. BIGELOW, Et Al. - - - - - - *Plaintiffs*

v.

DALLAS & MAVIS FORWARDING CO., INC.,
A Subsidiary of Jupiter Corporation
Transportation Systems - - - - - - *Defendant*

MEMORANDUM AND ORDER

This action comes before the Court on a Motion for Summary Judgment brought by the defendant, Dallas & Mavis Forwarding Co., Inc. ("D&M"). The plaintiffs have filed a Response.

BACKGROUND INFORMATION

The plaintiffs have brought this action asserting D&M has discriminated against them on the basis of age. D&M had an existing contract with the Ford Motor Company at its Louisville, Kentucky Truck Plant ("KTP"). Plaintiffs were members of the Teamster Union Local 89 ("Local 89") and were originally employed with a driveaway trucking operation known as Allied Systems, Inc. ("Allied") which also had an existing contract with KTP. D&M entered into a National Master Automobile Transporters Agreement and Central-Southern/Eastern Areas Driveaway Supplemental Agreement (the "National Agreement") with Local 89, as well as a local supplemental agreement (the "supplemental agreement").

After a rebidding with KTP, D&M won the contract for motor deliveries, while Allied won the hid for pre-ship-

ment preparations. As a result, many Allied employees, among whom were the plaintiffs, no longer had jobs in the yard and decking operations. D&M needed workers in the yard operation but had thirty-five (35) surplus driver positions.

When D&M took over the driveaway operation at KTP, it brought in its own employees. Plaintiffs and other former employees of Allied then brought an action asserting that they should have been hired pursuant to the National Agreement. D&M contended it had an obligation to fill the yard positions with its own workers who would be out of work because of the realignment caused by the new contract. The action went to a National joint Arbitration Committee (the "Committee") which rendered an opinion and award in December of 1990. A majority of the Committee held that the National Agreement required D&M to merge its KTP seniority list with Allied's list of laid-off employees. D&M sought to have the award vacated and the Sixth Circuit agreed with the Committee that the award was rationally drawn from the essence of the National Agreement. See *Dallas & Mavis Forwarding Co.* v. *Local Union 89*, 972 F.2d 129 (6th Cir. 1992).

D&M now asserts that the Committee retains jurisdiction over the remedies portion of the case as it has required D&M to make the employees whole for losses they incurred by D&M's refusal to employ them. In other words, the crux of D&M's argument is its assertion that the case at bar is not an age discrimination action but, rather, a case concerning the application of seniority under the National Agreement to employees of Allied seeking the same jobs as D&M employees.

D&M also contends that the employees who wanted to return to work have done so, in accordance with the decision of the Committee. D&M asserts that its decision not to hire the plaintiffs was based entirely upon its interpretation of the language in the National Agreement dealing with seniority provisions and the decisions of the Committee and not on the basis of their respective ages.

This Court agrees with the defendant.

MEMORANDUM

D&M's first argument is that this Court may not decide this case as it is preempted by § 301(a) of the Labor Management Relations Act (the "LMRA") which provides as follows:

> Suits for violation of contracts between an employer and a labor organization representing employees . . . may be brought in any district court of the United States having jurisdiction of the parties . . .

In support of its argument, D&M cites the federal case of *Allis-Chalmers* v. *Lueck*, 471 U.S. 202 (1985) which held as follows:

> The interests in interpretive uniformity and predictability that require that labor-contract disputes be resolved by reference to federal law also require that the meaning given in a contract phrase or term be subject to uniform federal interpretation. Thus, questions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement, must be resolved by reference to uniform federal law, whether such questions arise in the context of a suit for breach of contract or in a suit `alleging liability in tort. Any other result would elevate form over substance and allow patties to evade the requirements of sec. 301 by relabeling the contract claims as claims for tortious breach of contract.

The plaintiffs rely upon the decision of the United States Supreme Court in *Lingle* v. *Norge, Div. of Magic Chef, Inc.*, 108 S.Ct. 1877, 1885, 486 U.S. 399, 100, L.Ed.2d 410 (1988) which held:

> As a general proposition, a state-law claim may depend for its resolution upon both the interpretation of a collective bargaining agreement and a separate state-law analysis that does not turn on the agreement. In such a case, federal law would govern the interpretation of the agreement but the separate state law analysis would not thereby be preempted.

Plaintiffs assert that, should interpretation of the National Agreement be necessary, this Court must use federal law to assist it in the interpretation. The mere fact that interpretation is necessary, they argue, is insufficient to engage §301.

When a state law action does not depend upon the interpretation of a collective bargaining agreement, the action has been held to be "independent" of the agreement for 5301 pre-emption purposes. *Id. Lingle,* 108 S.Ct. at p. 1883.

It is abundantly clear that but for the Union Agreement the Plaintiffs would not have had any claim. Allied had lost the contract that justified their employment. D&M had won the contract based on the bid it made to Ford. It planned to satisfy its obligations under the contract with employees from within its company with known-performance records and salary scales.

The plaintiffs never formally applied for any of the D&M jobs and were rejected. Instead, they relied on their interpretation of the National Agreement, a reliance which was sustained for some of the plaintiffs and many Allied employees by the decision of the Committee. D&M contends they have complied with the decision of the Committee in hiring from the merged seniority lists. If D&M has not done so, then this is still a matter to be determined by the forum with jurisdiction over the collective bargaining agreement.

State court is not the proper forum for such a determination. As a matter of law the defendant is entitled to judgment.

ORDER

WEEREFORE IT IS HEREBY ORDERED AND ADJUDGED that the defendant's Motion for Summary Judgment be and hereby is GRANTED. This is a final and appealable order and there is no just cause for delay.

This 9th day of May, 1994.

/s/ F. Kenneth Conliffe, Judge
Jefferson Circuit Court

Entered in Court: May 9, 1994

EXHIBIT B

RENDERED: JUNE 7, 1996; 2:00 P.M.
NOT TO BE PUBLISHED

COURT OF APPEALS OF KENTUCKY

No. 94-CA-1176-MR

JOSEPH E. BIGELOW; WAYLAND BLAKELY;
SIMON BOLDEN; CARLTON BROWN;
WILLIAM DANNER; ENOCH DAVIS;
RANDALL DUVALL; TERRY G. HILLARD;
CHARLES HOGUE, JR.; LARRY HOWARD;
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STEVE NIFONG; JACK PATE;
MORRIS A. ROSE;
BILL SANDERS; HARLEY STARNES;
PAUL STONER; WILLIAM STROUD
and RON WEAVIL - - - - - - - - *Appellants*

versus

DALLAS & MAVIS FORWARDING COMPANY,
INC., a Subsidiary of JUPITER TRANSPORTATION COMPANY - - - - - - - - *Appellee*

Appeal From Jefferson Circuit Court
Honorable Kenneth Conliffe, Judge
Action No. 92-CI-1187

OPINION—AFFIRMING

BEFORE: DYCHE, GARDNER and GUDGEL, Judges.

GARDNER, JUDGE: Appellants appeal from an order of the Jefferson Circuit Court granting a summary judgment for the appellee, Dallas & Mavis Forwarding Company (D & M). The court ruled that as a matter of law, the appellants, age discrimination claims were preempted by the

federal Labor Management Relations Act (LMRA). After reviewing the record and the applicable law, this Court concludes that the circuit court ruled correctly, and hence affirms.

This action stems from a change in the transport companies doing yard and decking work at the Ford Motor Company's (Ford) Kentucky Truck Plant (KTP) in Louisville. Before March 1990, Allied Systems Inc. (Allied) held the contract with Ford to perform the yard and decking work at KTP. In 1990, D & M was awarded the contract to perform the yard and decking work.

The appellants were individual employees of Allied who were employed at KTP prior to D & M's takeover. These employees as well as D & M's employees were members of the Teamsters' Union (Teamsters). The Teamsters, D & M, and Allied were governed by a collective bargaining agreement known as the National Master Automobile Transporters Agreement (the national agreement) which controlled the rights of the workers at KTP. Pursuant to this agreement, the Teamsters and D & M had entered into a local agreement which allowed employees in one job classification to bid to transfer into another classification when the employer determines that there is a vacancy before the employer could hire outside people. The national agreement contained an arbitration/grievance procedure for resolving disputes that arose between the workers and employers.

The controversy in this case surrounds which employees would be called to work when D & M took over operations. Appellants have asserted that since they had more seniority than D & M's employees, they should have been called to work. D & M called its own employees, and has contended that pursuant to the agreements, it believed it was required to call its own employees. The Teamsters filed a grievance on behalf of the appellants pursuant to the national agreement. An arbitration committee (the committee) resolved the dispute and after considering the agreements and hearing both sides, ruled that D & M had

violated the national agreement and required D & M to compile a list of employees from D & M and Allied based on seniority. The committee held that D & M must offer jobs in its operations to those employees on the list and make whole all former Allied employees who accepted job offers for the time they were unemployed on March 5, 1990, until their employment by D & M in accordance with the conunittee's decision. D & M contested the committee's rulings in federal courts, but its action and subsequent appeals were not successful. In December 1991, D & M began to call former Allied employees to work in accordance with the committee's ruling. The employees were called in keeping with the order in which they appeared on the merged seniority list.

Appellants filed a complaint in Jefferson Circuit Court on February 20, 1992, contending that D & M had refused to hire them because of their age in violation of Kentucky Revised Statute (KRS) 344.040. In June 1993, D & M moved for summary judgment primarily on the ground that appellants' claims were preempted by Section 301 of the LMRA. On May 9, 1994, the circuit court entered an order granting the motion for summary judgment. It held that the appellants, claims were preempted, and the court did not directly address the merits of the appellants' claims. This appeal has followed.

Appellants contend in this appeal that their age discrimination claims under Kentucky law are not preempted by the LMRA. Thus, they maintain that the circuit court erred in entering a summary judgment for D & M. We believe that the circuit court correctly interpreted the law regarding pre-emption and hence, affirm.

Section 301 of the LMRA provides, "[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties . . . ." 29 United States Code (U.S.C.) § 185(a). Whether a certain state action is preempted by federal law is a question of congres-

sional intent. *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202, 105 S.Ct. 1904, 1909, 85 L.Ed.2d 206 (1985). Congress did not state explicitly to what extent it intended Section 301 of the LMRA to pre-empt state law. *Id.* Thus, in such cases courts sustain a local law unless it conflicts with federal law or would frustrate the federal scheme or unless the courts discern from the totality of circumstances that Congress sought to occupy the field to the exclusion of the states. *Id.*

When resolution of a state law claim is substantially dependent upon the analysis of the terms of a collective bargaining agreement, that claim must either be treated as a Section 301 claim or be dismissed as preempted by federal labor/contract law. *Id.*, 105 S.Ct. at 1916; *Caterpillar, Inc.* v. *Williams*, 482 U.S. 386, 107 S.Ct. 2425, 2431, 96 L.Ed.2d 318 (1987); *Adkins* v. *General Motors Corp.*, 946 F.2d 1201, 1207 (6th Cir. 1991); *Terwilliger* v. *Greyhound Lines, Inc.*, 882 F.2d 1033, 1036 (6th Cir. 1989) *See Lingle* v. *Norge Div. of Magic Chef, Inc.* 486 U.S. 399, 108 S.Ct. 1877, 100 L.Ed.2d 410 (1988) ; *Avco Corp.* v. *Aero Lodge No. 735, International Assoc. of Machinists and Aerospace Workers*, 390 U.S. 557, 88 S.Ct. 1235, 20 L.Ed.2d 126 (1968). If a state law claim is inextricably intertwined with the consideration of the terms of a labor contract, the claim is preempted. *Allis-Chalmers Corp.* v. *Lueck*, 105 S.Ct. at 1912. *See Adkins* v. *General Motors Corp.*, 946 F.2d at 1209. If claims are founded directly upon rights created by a collective bargaining agreement, Section 301 and federal law governs and preempts entirely. *Id.*, at 1207; *Terwilliger* v. *Greyhound Lines, Inc.*, 882 F.2d at 1036. As long as the state law claim can be resolved without interpreting the agreement itself, the claim is independent of the agreement for Section 301 preemption purposes. *Lingle* v. *Norge Div. of Magic Chef, Inc.*, 108 S.Ct. at 1883. If state law purports to define the meaning of the contract relationship, state law is preempted. *Allis-Chalmers*

Corp. v. *Lueck*, 105 S.Ct. at 1912. *See Adkins* v. *General Motors Corp.*, 946 F.2d at 1207.

A primary purpose of pre-emption in such cases is to avoid conflicts among courts in the interpretation of collective bargaining agreements. *Terwilliger* v. *Greyhound Lines, Inc.*, 882 F.2d at 1036. Another purpose of pre-emption is to prevent parties from avoiding the obligation of submitting to arbitration that is included in collective bargaining agreements. *Allis-Chalmers Corp,* v. *Lueck,* 105 S.Ct. at 1914; *Terwilliger* v. *Greyhound Lines,* Inc., 882 F.2d at 1038. A court must see whether resolution of a state law claim requires interpretation of the terms of a collective bargaining agreement such that the claim should have been decided by arbitration pursuant to the terms of the agreement and whether the claim is based upon rights created by the collective bargaining agreement or under state law. *Terwilliger* v. *Greyhound Lines, Inc.*, 882 F.2d at 1037.

In Kentucky, summary judgment should only be used to terminate litigation when as a matter of law it appears that it would be impossible for the respondent to produce evidence at trial warranting a judgment in his or her favor against the movant. *Steelvest, Inc.* v. *Scansteel Service Center, Inc.,*, Ky., 807 S.W.2d 476, 483 (1991), quoting *Paintsville Hospital Co.* v. Rose, Ky., 683 S.W.2d 255 (1985); *Farmer* v. *Heard,* Ky. App., 844 S.W.2d 425, 427 (1992). Summary judgment is properly granted only when there is no genuine issue as to any material fact and the movant is entitled to prevail as a matter of law. *Mullins* v. *Commonwealth Life Ins. Co.,* Ky., 839 S.W.2d 245, 247 (1992); CR 56.03.

In the instant case, the circuit court correctly ruled that the appellants, age discrimination claims under state law were preempted. The matter regarding which workers should be called by D & M to work clearly fell under the collective bargaining agreements. A grievance was filed, and in keeping with the national agreement, the controversy was submitted to arbitration. The arbitration commission ruled basically for the appellants and mandated that D & M compile a dovetail list based on seniority of both Allied's employees and D & M's employees and call

those employees to work. D & M complied and called the former Allied employees with proper seniority status back to work. For various reasons, some of the former Allied employees did not choose to return to work. Thus, the appellants' claims regarding who should have been called to work and their discrimination claims are inextricably intertwined with the terms of the agreements and to resolve this dispute, one must consider the agreements. The primary purposes behind preserving arbitration also come into play in the case at bar. The facts of the instant case are distinguishable from *Lingle* v. *Norge Div. of Magic Chef,* Inc., *supra; O'Shea* v. *Detroit* News, 887 F.2d 683 (6th Cir. 1989), and other cases relied on by the appellants.[1] The circuit court correctly entered summary judgment since as a matter of law, D & M was entitled to prevail.

For the foregoing reasons, we affirm the order of the Jefferson Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANTS:
Philip C. Kimball
Louisville, Kentucky
Harris J. Berman
Louisville, Kentucky
ORAL ARGUMENT FOR APPELLANTS:
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Louisville, Kentucky
BRIEF FOR APPELLEE:
C. John Holmquist
Fannington Hills, Michigan
F. Larkin Fore
Louisville, Kentucky
ORAL ARGUMENT FOR APPELLEE:
C. John Holmquist
Farmington Hills, Michigan

---

[1] The appellants also address the merits of their discrimination claim. we find it unnecessary to address this issue since the preemption issue is dispositive. Further, we cannot address issues not considered by the court below.

EXHIBIT C

COURT OF APPEALS OF KENTUCKY

No. 94-CA-1176-MR

JOSEPH E. BIGELOW; WAYLAND BLAKELY;
SIMON BOLDEN; CARLTON BROWN;
WILLIAM DANNER; ENOCH DAVIS;
RANDALL DUVALL; TERRY G. HILLARD;
CHARLES HOGUE, JR.; LARRY HOWARD;
GEORGE HUDSON; RODNEY H. KELIEN;
JOE LEONARD; DALE LEWIS;
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STEVE NIFONG; JACK PATE;
MORRIS A. ROSE; BILL SANDERS;
HARLEY STARNES; PAUL STONER;
WILLIAM STROUD and RON WEAVIL - - *Appellants*

versus

DALLAS & MAVIS FORWARDING COMPANY,
INC., a Subsidiary of JUPITER TRANSPORTATION COMPANY - - - - - - - - *Appellee*

Appeal From Jefferson Circuit Court
Honorable Kenneth Conliffe, Judge
Action No. 92-CI-1187

ORDER DENYING PETITION FOR REHEARING

BEFORE: DYCHE, GARDNER, and GUDGEL, Judges.

GUDGEL, JUDGE: The Court having considered the Petition for Rehearing and response thereto and being sufficiently advised, it is ORDERED that the same is hereby DENIED.

ENTERED: July 19, 1996

/s/ Paul D. Gudgel
Judge, Court of Appeals

EXHIBIT D

SUPREME COURT OF KENTUCKY

96-SC-709-D
(94-CA-1176)

JOSEPH E. BIGELOW, Et. Al. - - - - - - *Movants*

versus

DALLAS & MAVIS FORWARDING COMPANY, INC., a Subsidiary of JUPITER TRANSPORTATION COMPANY - - - - - - - - *Respondent*

Jefferson Circuit Court
No. 92-CI-1187

ORDER DENYING DISCRETIONARY REVIEW

The motion for review of the decision of the Court of Appeals is denied.

ENTERED May 14, 1997.

/s/ Robert F. Stephens
Chief Justice

EXHIBIT E

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. 3:95CV-568-S

JUDY WILD and
SALENA DARNELL - - - - - - - - - *Plaintiffs*

versus

HUTTIG SASH & DOOR COMPANY - - - *Defendant*

MEMORANDUM OPINION

This matter is before the court on the motion of the plaintiffs, Judy Wild and Salena Damell, to set aside our order entered in this case on February 23, 1996.

In our memorandum opinion entered with that order, we held that 29 U.S.C. § 185, "§ 301" of the Labor Management Relations Act, preempts the plaintiffs' state law claims. Upon reconsideration and further examination of the arguments presented by the parties, it is apparent that the plaintiffs' claims are not preempted by § 301. Thus our previous memorandum opinion and order entered on February 23, 1996 will be set aside. The defendant's motion to dismiss will be addressed herein.

DISCUSSION

The plaintiffs were employees of the defendant. The terms of their employment were governed by the collective bargaining agreement (CBA) entered into by the defendant and the International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, Furniture Workers Division Local 236. The complaint alleges that the defendant discharged or laid-off the plaintiff's because of their sex, in violation of K.R.S. § 344.040(1). Huttig contends that these claims are preempted by federal labor

law, 29 U.S.C. § 18 5, "§ 3 01" of the Labor Management Relations Act. Therefore, it argues that the complaint must be dismissed.[1]

Section 301 provides the federal district courts with jurisdiction over "[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce. . . ." 29 U.S.C. § 185(a). "[T]he Supreme Court has held that section 301 preempts state law rules that substantially implicate the meaning of collective bargaining agreement terms." *DeCoe* v. *General Motors Corp.*, 32 F.3d 212 (6th Cir. 1994) (citing, *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202,210 (1985); *Teamsters Local 174* v. *Lucas Flour Co.*, 369 U.S. 95 (1962)). "This rule is necessitated by the need for uniformity and predictability in interpreting the meaning of Contract terms." *Id.*

The Sixth Court developed a two-step approach for determining whether § 301 preemption applies. *DeCoe*, 32 F.3d at 216. We must examine whether the state law claim may be proven without interpretation of collective bargaining agreement terms and whether the right claimed by the plaintiff is created by the collective bargaining agreement or independently by state law. Id. (citing *TerwilIiger* v. *Greyhound Lines, Inc.*, 882 F.2d 1033, 1037 (6th Cir. 1989), *cert. denied*, 495 U.S. 946 (1990)). "[I]f neither or only one criterion is satisfied, section 301 preemption is warranted." *Id.* (citing *Smolarek* v. *Chrysler Corp.*, 879 F.2d 1326, 1331 (6th Cir.), *cert. denied*, 493 U.S. 992 (1989).

The *DeCoe* court directed us to look to the elements of the state law claim in order to determine if it requires interpretation of the collective bargaining agreement. *Id.*

---

[1] We note at the outset that the defendant's challenge to the plaintiffs' claims is not appropriately presented as a motion for summary judgment *Knox* v. *Wheeling-Pittsburgh Steel Corp., 899 F.* Supp. 1529,1533 (N.D. W.Va. 1995). However, the defendants motion to dismiss is an appropriate challenge and we will examine the merits on that alternative basis. *See, Id.*

at 217. Unlawful employment discrimination may be proved through either disparate treatment or disparate impact. *White* v. *Rainbo Baking Co.*, 765 S.W.2d 26, 29 (Ky. App. 1989) (citing *Rowe* v. *Cleveland Peneumatic Company*, 690 F.2d 88 (6th Cir. 1982)). Inasmuch as the plaintiffs complain of direct action taken against them on the basis of their sex, their claims fall under disparate treatment analysis. To prevail under this theory, a plaintiff must show that the employer treated the plaintiff less favorably due to the plaintiff's sex. *Id.* (citations omitted). This burden, in itself, raises purely factual considerations of conduct and motivation. Nor does the fact that the CBA generally prohibits discrimination in the workplace "make the existence or the contours of the state law violation dependent upon the terms of the private contract." *Smolarek*, 879 F.2d at 1332.

It is necessary for the plaintiffs to prove their allegations that Huttig violated their civil rights under Kentucky law, independent of the collective bargaining agreement. *Id.* at 1333. The defendant makes much of the plaintiffs' discussion of the terms of the CBA. It notes that the plaintiffs do not have any state law entitlement to seniority independent of the terms of the CBA and that they clearly intend to rely upon the CBA to establish their claims. However, as the plaintiffs note, to prevail on their claim they need only prove that they suffered an adverse employment action (here a layoff) and that this action was motivated by gender discrimination. "Neither of the elements requires a court to interpret any term of a collective-bargaining agreement. "*See, e.g., Lingle* v. *Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 407 (1988) (applying preemption analysis to state tort claim of retaliatory discharge and *see* note 12 at page 413); *see also, Smolarek*, 879 F.2d at 1334 (applying same analysis to state law discrimination claim). It will not suffice for the plaintiffs to prove merely a breach of the CBA. Nor will it be necessary to interpret the CBA or to choose from among different interpretations of the CBA at the outset of this suit. *See, Smolarek*, 879 F.2d at 1334 (noting that to resolve the

plaintiffs state law discrimination claim the court need only decide whether the defendant took adverse action because of improper motive). Notwithstanding the plaintiffs' iteration of their rights under the CBA, this is a rather typical claim of gender discrimination under Kentucky law.

In *O'Shea* v. *Detroit News,* 887 F.2d 683 (6th Cir. 1989), the Sixth Circuit addressed the issue of preemption with regard to a state law discrimination claim. In that case the plaintiff noted in her complaint that the defendant had discriminated against her in breaching the employment agreement due to an improper motive. *Id.* at 686. The court applied the two-step analysis later spelled out in *DeCoe.* It noted that employees have the right not to be discriminated against based upon an illegal motive without regard to a collective bargaining agreement. *Id.* at 687. The court held that the plaintiffs claims were not preempted, because they were not based on the employment agreement. *O'Shea* is instructive when applied to the naked claim in the case at hand.

In fight of our review of *Lingle, Smolarek, and O'Shea,* we conclude that the plaintiffs' claims are not preempted by federal labor law. Proof of the plaintiffs' claims does not require interpretation of the terms of the CBA. Furthermore, the right not to be discriminated against in employment decisions based on gender is independent of the terms of the contract. *See, e.g., O'Shea,* 887 F.2d at 687. Resolution of the claims here wig involve a state law analysis which does not turn on the CBA. Thus applying the test laid out in *DeCoe,* the plaintiffs' claims are not preempted.

The motion to set aside wiH be granted and the defendant's motion to dismiss will be denied by separate order.

This 4th day of June, 1996.

ENTERED: June 4, 1996

/s/ Charles R. Simpson, III
Charles R. Simpson, III, Chief Judge
United States District Court

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. 3:95CV-568-S

JUDY WILD and
SALENA DARNELL - - - - - - - - - *Plaintiffs*

versus

HUTTIG SASH & DOOR COMPANY - - - *Defendant*

ORDER

This matter having come before the court on the motion of the plaintiffs, Judy Wild and Salena Darnell to set aside the court's order entered FebruarY 23, 1996 and the court having considered said motion and being otherwise sufficiently advised, IT IS HEREBY ORDERED that the motion to set aside is GRANTED. Our order and memorandum opinion entered in this case on February 23, 1996 are SET ASIDE. IT IS FURTHER ORDERED that the defendant's motion to dismiss the complaint as preempted by federal labor law is DENIED.

IT IS SO ORDERED.

This 4th day of June, 1996.

/s/ Charles R. Simpson, III
Charles R. Simpson, III, Chief Judge
United States District Court

ENTERED: June 4, 1996

cc: Counsel of Record

OPPOSITION

BRIEF

Supreme Court, U. S.
F I L E D
SEP 12 1997
CLERK

No. 97-0287

In The

Supreme Court of the United States

October Term, 1996

JOSEPH E. BIGELOW, WAYLAND BLAKELY, SIMON BOLDEN, CARLTON BROWN, WILLIAM DANNER, ENOCH DAVIS, RANDALL DUVALL, TERRY G. HILLARD, CHARLES HOGUE, JR., LARRY HOWARD, GEORGE HUDSON, RODNEY H. KELIEN, JOE LEONARD, DALE LEWIS, ADAM LUDLOW, DANIEL L. MILLER, JR., STEVE NIFONG, JACK PATE, MORRIS A. ROSE, BILL SANDERS, HARLEY STARNES, PAUL STONER, WILLIAM STROUD, and RON WEAVIL,

Petitioners,

versus

DALLAS & MAVIS FORWARDING COMPANY, INC., a subsidiary of JUPITER TRANSPORTATION COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Kentucky

BRIEF IN OPPOSITION

CHARFOOS, REITER, PETERSON, HOLMQUIST & PILCHAK, P.C.

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10 pp

LISTING OF ALL COMPANIES AND AFFILIATES OF RESPONDENT

Respondent Dallas & Mavis Forwarding Co. is an unincorporated division of Active USA, Inc., an Indiana corporation. The parent of Active USA, Inc. is Active Transportation Company, a Kentucky general partnership. Jupiter Transportation Company is no longer involved in this matter.

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BRIEF IN OPPOSITION

Respondent, Dallas & Mavis Forwarding Co. ("D&M") respectfully requests this Court to deny the Petition for Writ of Certiorari seeking review of the Kentucky Supreme Court's Order denying discretionary review of the Kentucky Court of Appeals' decision. Those opinions are not reported and are reprinted as Exhibit B, Exhibit C and Exhibit D at pp. 6a-13a of the Appendix A[1] to the Petition for Writ of Certiorari.

COUNTERSTATEMENT OF FACTS

A. Facts.

Respondent D&M adopts the discussion of facts set forth in the Kentucky Court of Appeals' opinion found in Exhibit B at App. 6a-11a.

B. Opinions Below.

The Memorandum and Order of the Jefferson Circuit Court granting D&M's Motion for Summary Judgment and entering an Order to that effect is found in the Appendix as Exhibit A, 1a-5a. The Kentucky Court of Appeal's opinion affirming the Order of the Jefferson Circuit Court is found in the Appendix at Exhibit B, 6a-11a. Kentucky Court of Appeals Order denying Petition for Rehearing is found in the Appendix at Exhibit C, 12a. The Supreme Court of Kentucky's Order Denying

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[1] References to the Exhibits in the Appendix to the Petition are designated as "App. ___a."

Discretionary Review is found in the Appendix as Exhibit D, 13a.

REASONS FOR DENYING THE WRIT

1. Neither the decisions below nor the record raises the Question Presented in the Petition.

The sole question presented in the Petition is whether this Court should adopt a "bright line" rule of law that would preclude "preemption" by Section 301 of the Labor Management Relations Act (29 U.S.C. §185(a)) for claims of unlawful employment discrimination based on state statutes which "mirror" applicable federal employment discrimination statutes (p. i).[2] This issue was not similarly framed before any of the Kentucky courts. Indeed, as noted by the Kentucky Court of Appeals in its Opinion, the Petitioners contended that their age discrimination claims under Kentucky law were not preempted by the LMRA (Exhibit B, App. 6a-7a). No request was made to fashion such a rule. The Kentucky Court of Appeals reviewed the preemption issue and followed this Court's decisions in *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985) and *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988) in affirming the dismissal of the case (Exhibit B, App. 8a-10a).

Petitioners' desire for a "bright line" rule arises from their apparent frustration with the fact that courts will

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[2] References to the Petition are designated as "p. ___."

actually engage in an in-depth examination of the preemption issue which in numerous instances leads to the finding that a particular claim is preempted under federal labor law. The apparent rationale for the "bright line" rule is the "savings" which would arise since there would no longer be the "obvious waste of precious judicial resources" in those cases where there is in fact a relationship between a Section 301 claim and state law employment discrimination claims (p. 12).

In extending this invitation to the court, Petitioners have ignored this Court's decision in *Allis-Chalmers v. Lueck*. This Court stated that the full scope of the preemptive effect of federal labor contract law will be "fleshed out" on a case-by-case basis. 471 U.S. at 220. Thus, the request for a "bright line" rule which was not brought up in of the proceedings before the Kentucky courts has, in fact, already been addressed by this Court. There is no need or urgency to revisit this issue.

2. The unique facts of this case limit the application of the standard sought by Petitioners.

D&M submits that the facts in this case are unique and are not suitable to resolve the "global" issue as set forth in the Question Presented by the Petitioners. Although the Petitioners styled their case in state court as an age discrimination case, the case involves seniority, and therefore, involves the collective bargaining agreement in effect between the parties.

As the successful bidder for the yard operations, D&M needed to staff its operation. As indicated in the Petition and in the Court of Appeals Opinion, both D&M

and the other employer (Allied) were signatory to the same collective bargaining agreement to which the local Teamsters Union (Local 89) was signatory (p. 4; Exhibit B, App. 7a).

The issue was which group of employees would be entitled to perform the work. This case did not involve hiring from the general public nor did it involve any review of an applicant pool by D&M. All the parties, the Petitioners, the companies, and the union, knew that one of the two groups of employees would perform the work. The issue of which group of employees was ultimately submitted to and resolved by a board of arbitration pursuant to the terms of the contractual grievance and arbitration procedure.

D&M chose to use its own employees, and subsequently found that its action was not the correct interpretation in implementation of the seniority provisions of the contract (Exhibit B, App. 7a-8a). D&M was forced to "dovetail" by seniority the employees of both companies. Since almost all of the Petitioners and other Allied employees were senior in terms of length of service to the D&M employees, they were able to "bump" or replace them through the use of seniority (p. 5). The Petitioners and the other Allied employees were awarded backpay and other contractual benefits to which they were deemed to be entitled.

A review of the Statement of the Case in the Petition underscores the unique factual nature of this case. Nowhere in the recitation of material facts is there any suggestion that the Petitioners filled out applications or

otherwise took actions consistent with seeking to be considered for employment with D&M. To the contrary, Petitioners and other employees believed it was their right under the collective bargaining agreement to "follow the work" without regard to the particular company that was contracted to perform the yard and decking operations (p. 5). The facts in this case do not deal with an unlawful refusal to hire because of age, but as Petitioners readily acknowledge, a dispute over the improper application of the seniority provisions of the collective bargaining agreement as to which one of the two groups of employees would be entitled to perform the work for D&M.

The Petitioners' own Statement of Facts is consistent with the facts as recited in the Kentucky Court of Appeals Opinion. As the Court of Appeals stated in its Opinion, the controversy surrounded which employees would be called to work when D&M took over operations (Exhibit B, App. 7a). The dispute was submitted to arbitration and after a hearing, the arbitration committee ruled that D&M had violated the National agreement and was obligated to offer jobs to Petitioners and other employees (Exhibit B, App. 7a-8a). The Court of Appeals correctly found that the Petitioners' claims regarding who should have been called to work and regarding their age discrimination claims are inextricably intertwined with the terms of the collective bargaining agreement. In order to resolve this dispute, one had to consider the collective bargaining agreement (App. 11a). The Kentucky Court of Appeals' action was consistent with this Court's decisions in *Allis-Chalmers* and in *Lingle*.

D&M finds itself in the unique position of being sued by Petitioners for a purported refusal to hire because of age discrimination in violation of Kentucky state law when this same group was given seniority rights with D&M pursuant to an award of the arbitration committee. Not only were the Petitioners offered the opportunity to work, but they were "made whole" as required under the collective bargaining agreement.

Thus, what is styled by the Petitioners as an "age" claim is in reality a seniority claim. As such, the seniority claim was submitted to and resolved by the mechanism set forth in the collective bargaining agreement which was final and binding upon all the parties including Petitioners. The only apparent purpose of the Petition is to pursue an academic exercise of the propriety of establishing a "bright line" standard, even in the face of this Court's decisions to the contrary. The uniqueness of the facts of this case renders it inappropriate for review by this Court.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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